

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Updating the Intercarrier Compensation)	WC Docket No. 18-155
Regime to Eliminate Access Arbitrage)	

**COMMENTS OF PEERLESS NETWORK, INC.
AND AFFINITY NETWORK, INC. D/B/A ANI NETWORKS**

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Peerless Network, Inc. (“Peerless”) and Affinity Network, Inc. d/b/a ANI Networks (“ANI”) respectfully submit these comments pursuant to the Notice of Proposed Rulemaking issued by the Federal Communications Commission (“Commission”) in the above-referenced proceeding.¹

Introduction and Summary

Peerless, through its affiliates, is a competitive local exchange carrier (“CLEC”) in 46 states and the District of Columbia that provides interconnection services for carriers and non-carriers alike and for all types of traffic via innovative end office, tandem, and advanced routing services.

ANI is a facilities-based wholesale carrier providing high quality long distance services to a wide range of telecommunications carriers, including CLECs, incumbent carriers, cable providers, hosted voice over Internet protocol (“VoIP”) providers, wireless and switchless resellers. ANI offers carrier services, including carrier origination and termination services, as well as resale services, such as traditional 1+ services, outbound calling services, toll free services, and carrier identification codes translations.

¹ *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Notice of Proposed Rulemaking, 83 Fed. Reg. 30628 (rel. June 5, 2018) (“*NPRM*”).

As explained below, to address access arbitrage issues the NPRM seeks to eradicate, the Commission should adopt CenturyLink's Proposed Direct Connect Rule² because it will: (1) eliminate arbitrage schemes associated with terminating all or certain types of traffic to a terminating carrier's end users, (2) promote efficient direct connects and routing of terminating traffic, (3) promote sufficient network redundancy necessary to help decrease the risk to public safety and exposure to network outages, (4) enhance competition and market efficiency, and (5) increase incentives for and remove barriers to facilities investment and the IP transition.

However, if the Commission has reservations in applying CenturyLink's Proposed Direct Connect Rule to all carriers, the Commission could apply a minimum threshold line or traffic requirement to carriers at the holding company level or it may exempt local exchange carriers ("LECs") subtending Centralized Equal Access ("CEA") networks. While Peerless and ANI do not support inserting a threshold, if the Commission ultimately determines one is necessary, it should do so in a way that the threshold only applies to terminating carriers (as they have the bottleneck monopoly in accessing their end users) and not intermediate carriers (as they simply route retail and/or wholesale traffic to terminating carriers). In addition, any threshold calculation should be based on the terminating carrier's total aggregate lines or traffic, which includes all retail and wholesale lines or traffic.

Moreover, if the Commission ultimately decides to "require access-stimulating LECs to

² CenturyLink's proposed rule requires carriers "(i) to permit requesting carriers to directly interconnect their networks for the termination of access traffic; or (ii) if the carrier receiving a request for direct interconnection for the termination of access traffic nevertheless prefers to receive such traffic through indirect interconnection, to bear financial responsibility for the costs of receiving traffic from the point of direct interconnection they prefer" ("CenturyLink's Proposed Direct Connect Rule"). *See* Letter from Timothy M. Boucher, Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-98, 01-92; WC Docket Nos. 07-135, 10-90, 18-155, at 1 (filed May 21, 2018) ("CenturyLink's May 21, 2018 Letter").

choose either to: (i) bear the financial responsibility for the delivery of terminating traffic to their end office, or functional equivalent, or; (ii) accept direct connections from either the IXC or an intermediate access provider of the IXC's choice" as proposed in the NPRM,³ (collectively, the "Commission's Proposed Rule"), the Commission is urged to ensure that the rule is narrowly tailored so that it only applies to LECs that subtend CEA networks. No justification exists for applying the rule outside of such networks and doing so would embolden interexchange carriers ("IXCs") to engage in more "self-help."

Finally, the Commission should reject any arguments that attempt to legitimize (a) denials of direct connect requests to terminate all or certain types of traffic to a terminating carrier and (b) requirements that all or certain types of traffic be sent through the terminating carrier's intermediate carrier partner(s). The Commission should find such arguments are specious, self-serving, and devoid of evidentiary support.

I. The Commission Should Adopt CenturyLink's Proposed Direct Connect Rule.

The *NPRM* seeks comment on proposed solutions to eliminate access arbitrage, including, among other proposed measures, CenturyLink's Proposed Direct Connect Rule,⁴ which is a rule with "broader applicability" than the Commission's Proposed Rule that simply focuses on access-stimulating LECs.⁵ Peerless and ANI support the Commission's adoption of CenturyLink's Proposed Direct Connect Rule for five compelling reasons, which Peerless, CenturyLink, and others have similarly and previously noted.⁶

³ *NPRM*, ¶ 9 & App. A Proposed Rule 51.914(a).

⁴ *See* CenturyLink's May 21, 2018 Letter, at 3.

⁵ *NPRM*, ¶ 23.

⁶ *See, e.g.*, CenturyLink's May 21, 2018 Letter, at 2-3; Letter from John Barnicle, President and Chief Executive Officer, Peerless Network, Inc. and Philip Macres, Counsel for Peerless, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 & 07-135; CC Docket No. 01-92

First, adopting CenturyLink’s Proposed Direct Connect Rule will address the FCC’s objectives in this proceeding by eliminating arbitrage schemes associated with terminating all or certain types of traffic to a terminating carrier’s end users.⁷ The opportunity for arbitrage arises when a terminating carrier (1) requires that all or certain types of terminating traffic be routed through its intermediate carrier partner and (2) does not offer direct connects to other carriers seeking to deliver all or certain types of traffic to the terminating carrier’s end users. Because a

(dated Mar. 15, 2018) (“Peerless’s Mar. 15, 2018 Letter”), available at <https://ecfsapi.fcc.gov/file/1031530934781/2018-03-15%20Ex%20Parte%20of%20Peerless%20Network%2C%20Inc..pdf>; Comments of Peerless Network, Inc. *et al.*, WC Docket No. 10-90; CC Docket No. 01-92, at 20-23 (filed Oct. 26, 2017) (“Carrier Coalition Comments”), available at <https://ecfsapi.fcc.gov/file/1026216424632/2017-10-26%20Comments%20of%20Peerless%2C%20West%2C%20Peninsula%20Fiber%20Network%2C%20Alpha%20Connect%2C%20Nex-Tech%2C%20and%20iRis%20Networks.pdf>; Reply Comments of Peerless Network, Inc. *et al.*, WC Docket No. 10-90; CC Docket No. 01-92, 11-14 (filed Nov. 20, 2017) (“Carrier Coalition Reply Comments”), available at <https://ecfsapi.fcc.gov/file/1120580029282/2017-11-20%20Reply%20Comments%20of%20Peerless%2C%20West%2C%20Peninsula%20Fiber%20Network%2C%20Alpha%20Connect%2C%20Nex-Tech%2C%20and%20iRis%20Networks.pdf>; Letter from Philip Macres, Counsel for Consolidated Communications Companies, Peerless Network, Inc., and West Telecom Services, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 & 07-135; CC Docket No. 01-92, at 2-3, & handout at 2 & Examples 1-2 (diagrams) (filed Dec. 4, 2017) (“Consolidated *et al.* Dec. 4, 2017 Letter”), available at <https://ecfsapi.fcc.gov/file/1204455516966/2017-12-04%20Ex%20Parte%20Notice%20of%20Consolidated%2C%20Peerless%2C%20and%20West%2C%20WC%20Docket%20Nos.%2010-90%20%26%202007-135%2C%20CC%20Docket%20No.%2001-92.pdf>; Letter from Michel Singer Nelson, Counsel and Vice President of Regulatory and Public Policy, O1 Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 & 07-135; CC Docket No. 01-92 (filed Jan. 11, 2018) (“O1’s Jan. 8, 2018 Letter”), available at <https://ecfsapi.fcc.gov/file/10109097865916/2018-01-08%20Ex%20Parte%20Notice%20of%20O1%20Communications%20Inc..pdf>; Letter from Michel Singer Nelson, Counsel and Vice President of Regulatory and Public Policy, O1 Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 & 07-135; CC Docket No. 01-92 (filed Jan. 11, 2018) (“O1’s Jan. 8, 2018 Letter”), available at <https://ecfsapi.fcc.gov/file/10111224366737/1.11.18%20%20O1's%20Ex%20Parte%20Response%20to%20T-Mobile's%20Jan.%202018%20Letter.pdf>.

⁷ “Terminating carrier” as used in these comments is the carrier that actually terminates the call directly to the called party who is served by the terminating carrier’s network.

terminating carrier has a “bottleneck monopol[y] over access to each individual end user,”⁸ the terminating carrier’s intermediate carrier partner, by extension, also has a bottleneck monopoly in delivering such terminating traffic to the terminating carrier’s end users.

With this bottleneck monopoly, the intermediate carrier partner is able to assess charges that are unjust and unreasonable, and otherwise far more expensive on a per Minute of Use (“MOU”) basis than sending the traffic over direct connects to the terminating carrier.⁹ The terminating carrier is incented to enter into such arrangements because its intermediate carrier partner then (on information and belief) shares, either directly or indirectly, the revenues from handling such traffic with the terminating carrier.¹⁰ Stated differently, the terminating carrier benefits by indirectly receiving revenues for traffic that it could not directly charge to terminate under the Commission’s bill-and-keep regime, absent an agreement to do so. It warrants emphasizing that the record demonstrates that *some of the largest terminating carriers in the nation—with millions of end users—are not only participating in these highly inappropriate arrangements, but also incentivized to do so by the current intercarrier compensation regime.*¹¹ By adopting CenturyLink’s Proposed Direct Connect Rule, the Commission could effectively

⁸ *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, ¶ 30 (2001) (further explaining that “once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user.”).

⁹ As the Commission explained in the *NPRM*, “[i]f there is a sufficient volume of traffic, the monthly charges for direct connections can often be substantially lower than per-MOU rates for an equivalent amount of traffic.” *NPRM*, ¶ 13.

¹⁰ *See, e.g.* Peerless’s Mar. 15, 2018 Letter, at 9; Carrier Coalition Comments, at 15; Carrier Coalition Reply Comments, at 12; Consolidated *et al.* Dec. 4, 2017 Letter, at Examples 1-2 (diagrams); O1’s Jan. 11, 2018 Letter, at 2.

¹¹ *See, e.g.*, Carrier Coalition Comments, 13-15 & 18-19.

eliminate the incentive for engaging in such arbitrage by placing financial responsibility on terminating carriers that choose to deny a direct connect request to terminate all or certain types of traffic.¹²

Second, CenturyLink's Proposed Direct Connect Rule will promote efficient direct connects and routing of terminating traffic. Contrary to the position taken by NTCA,¹³ ensuring the availability of direct connects is not an issue prompted by defining the "network edge," *i.e.*, "the point where bill-and-keep applies,"¹⁴ but rather ensures efficient routing of traffic because terminating carriers that decline direct connect requests would be required to bear the financial responsibility for their denial. Further, the cost of routing all or certain types of traffic indirectly to the terminating carrier should not be imposed on the carrier that seeks to route such traffic over direct connects. This is not a new or novel networking construct because most incumbent LECs ("ILECs") already offer direct connects to their end offices via tariffs or interconnection agreements. For example, both ILECs and rural LECs outside of CEA networks that concur in the

¹² It warrants emphasizing that such terminating carriers must be required to offer direct connects for *all types* of terminating traffic. Stated differently, there should be no limitations on the type of traffic, whether it be retail, wholesale, interLATA, intraMTA, interMTA, or mixture of such terminating traffic that can be routed over direct connects to a terminating carrier.

¹³ See, e.g., Letter from Michael R. Romano, Senior Vice President – Industry Affair & Business Development, NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 18-155, 18-156, 17-206 & 10-90 (dated May 22, 2018) (noting that the Commission should "decline to venture in this forum into broader sweeping debates regarding network edges and "end states" for compensation").

¹⁴ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Inter-carrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; GN Docket No. 09-51; CC Docket Nos. 01-92 and 96-45; WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 1320 (2011).

NECA Tariff already offer Direct-Trunked Transport (“DTT”),¹⁵ which is what access-stimulating LECs would be required to offer under the second prong of the Commission’s Proposed Rule.¹⁶ Moreover, in Section 251 interconnection agreements, ILECs typically offer direct connects to their end offices and mandate such direct connects when certain levels of traffic are being terminated to end users served out of a particular end office.¹⁷

Third, adopting CenturyLink’s Direct Connect Rule would promote sufficient network redundancy that, in turn, decreases the risk to public safety and exposure to network outages and service disruptions.¹⁸ Indeed, the Level 3 Nationwide Outage on October 4, 2016¹⁹ and the *Katrina Report* demonstrates the critical necessity of having redundant switching pathways and redundant traffic routing.²⁰ Such redundancy is significantly limited when terminating carriers exploit their bottleneck monopoly by denying direct connects and requiring that terminating traffic be funneled through their intermediate carrier partners. Moreover, decreased redundancy creates many other risks, such as increased instances of post-dial delays, non-completions, and dropped calls.²¹

Fourth, adopting CenturyLink’s Proposed Direct Connect Rule will enhance competition

¹⁵ See, e.g., National Exchange Carrier Association, Inc. (“NECA”), Tariff F.C.C. No. 5, at § 5.2.1 9th Revised Page 5-5 & § 6.1.3, 12th Revised Page 6-8.

¹⁶ See *NPRM*, ¶¶ 9, 13 & App. A Proposed Rule 51.914(a)(2) & (b)(2).

¹⁷ See Coalition Carrier Comments, at 12.

¹⁸ See, e.g. Peerless’s Mar. 15, 2018 Letter, at 5-6.

¹⁹ See Level 3 Nationwide Outage October 4, 2016, Public Safety and Homeland Security Bureau, Cyber Security and Communications Reliability Division Staff Report (Mar. 13, 2018), available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0313/DOC-349661A1.pdf.

²⁰ *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, EB Docket No. 06-119, Notice of Proposed Rulemaking, 21 FCC Rcd 7320, App. B at 14 (2006) (“*Katrina Report*”) (discussing the need for “redundant pathways” because the “switches that failed, especially the tandems, had widespread effects on a broad variety of communications in and out of the Katrina region.”).

²¹ See Carrier Coalition Comments, at 19.

and market efficiency because more carriers will have direct connects to terminating carriers.²² With more carriers having such direct connects, the rates to terminate traffic will inevitably be forced downward to competitive levels. Indeed, if an intermediate carrier attempts to charge excessive rates to route traffic to a particular terminating carrier, then other carriers would simply use an intermediate carrier that offers more competitive prices or obtain their own direct connects to the terminating carrier. Absent Commission intervention, however, the terminating carriers that refuse direct connections (for all traffic or certain types of traffic) will continue to allow such carriers' intermediate carrier partners to charge excessive rates or rates that are higher than what a carrier would pay if it had direct connects.²³

Lastly, adopting CenturyLink's Proposed Direct Connect Rule will increase incentives for and remove barriers to facilities investment and the IP transition. As indicated above, by eliminating monopoly bottlenecks and increasing competitive alternatives to terminate traffic, the rates to terminate traffic will decrease, which will thereby free up funds for investment in IP-based networks and interconnects. Relatedly, as touched upon above, the Commission's adoption of CenturyLink's Proposed Direct Connect Rule would encourage efficient network deployment and investment decisions because carriers will bear the costs associated with their own network deployment, interconnection, and call routing decisions, thereby incentivizing efficient choices.²⁴

²² See Carrier Coalition Comments, at 21 (explaining that a direct connect requirement "will increase the availability of competitive routing and interconnection services.").

²³ See, e.g. Peerless's Mar. 15, 2018 Letter, at 3 & n.11.

²⁴ See CenturyLink's May 21, 2018 Letter, at 2; see also Peerless's Mar. 15, 2018 Letter at 5 (explaining that when a terminating carrier prohibits direct connections for certain types of traffic and requires the sending carriers to either segregate traffic or connect indirectly through the terminating carrier's intermediate carrier partner, many carriers, especially smaller ones, are "forced to send their traffic through" the intermediate carrier partner and pay its "excessive charges").

Tellingly, the record demonstrates the ability of carriers to invest in network facilities and the IP transition has been dramatically undermined by these monopoly bottlenecks that do not permit direct connects for all or certain types of traffic. For example, at its peak, Peerless terminated over 1.1 billion MOUs over its direct connects to T-Mobile at \$0. If Peerless were terminating this amount of traffic to T-Mobile today (which would now need to be rerouted through Inteliquent), *Peerless's annual cost to terminate such traffic would cost over \$25 million—* given the skyrocketing price increases Inteliquent imposed after cementing its monopoly stranglehold over terminating traffic to T-Mobile (which others, including Peerless, previously routed over direct connects).²⁵ Not only are the Commission's objectives to promote network investment defied by the elimination and denial of direct connects, but given the resulting price increases, carriers have no option but to pay the bottleneck provider with funds that they could have otherwise used to invest in network facilities and the IP transition.

If the Commission has reservations, however, in applying CenturyLink's Proposed Direct Connect Rule to all carriers, the Commission could consider applying a threshold line requirement at the holding company level, as the *NPRM* proposes.²⁶ However, Peerless and ANI question whether a threshold of 100,000 or more "lines" is appropriate given the bottleneck monopoly terminating carriers have over their end users.²⁷ Therefore, when considering whether a threshold line requirement is necessary, Peerless and ANI urge the Commission to also consider adoption of CenturyLink's Proposed Direct Connect Rule with a significantly reduced or no line or traffic

²⁵ OI's Jan. 11, 2018 Letter, at 2 (as OI reports, Inteliquent's rates skyrocketed by over 400% shortly after the exclusive agreement between T-Mobile and Inteliquent was announced in 2015).

²⁶ *NPRM*, ¶ 30 (asking if direct connect rules, such as CenturyLink's Proposed Direct Rule, should be focused "on large terminating providers—i.e., those with 100,000 or more "lines" at the holding company level.").

threshold requirement, as doing so would obviate the need to adopt the Commission's Proposed Rule, which is primarily designed to eliminate access arbitrage by access-stimulating LECs that subtend the networks of CEA providers.²⁸

Further, while Peerless and ANI do not support inserting a threshold, if the Commission ultimately determines one is necessary, it should do so in a way that the threshold only applies to terminating carriers (as they have the bottleneck monopoly in accessing their end users) and not intermediate carriers (as they simply route retail and/or wholesale traffic to terminating carriers). Any threshold calculation should also be based on the terminating carrier's total aggregate lines or traffic, which includes all retail and wholesale lines or traffic.

In addition, if the Commission has any reservations about applying CenturyLink's Proposed Direct Connect Rule to LECs within CEA networks, the Commission could exempt access stimulating LECs within CEA networks from the application of this rule and instead apply the Commission's Proposed Rule to the CEA networks, which only operate in three states of the country.²⁹

II. If the Commission Decides to Adopt its Proposed Rule, the Rule Must Be Narrowly Tailored to Only Apply to LECs Subtending CEA Networks.

If the Commission nevertheless decides to adopt its Proposed Rule (rather than CenturyLink's Proposal Direct Connect Rule), the Commission should narrowly tailor its Proposed Rule so that it only applies to LECs that subtend CEA networks. In short, no justification exists for the Commission to apply its Proposed Rule to LECs outside of CEA networks because they already offer DTT or allow carriers to connect to them directly. Notably, as indicated above,

²⁸ *NPRM*, ¶ 7

²⁹ *Id.*

ILECs and RLECs *outside* of CEA networks that concur in the NECA Tariff already offer DTT,³⁰ which is what the Commission’s Proposed Rule would impose as a second prong under it.³¹ Moreover, CLECs are required to permit an “IXC to install direct trunking from the IXC’s point of presence to the competitive LEC’s end office.”³²

Narrowing of the Commission’s Proposed Rule to LECs within CEA networks is also necessary to ensure that IXCs do not exploit the rule as a means to justify “self-help” outside of CEA networks. Specifically, if the Commission extends the scope of its Proposed Rule beyond CEA networks, IXCs would likely rely on such a rule to engage in self-help and not pay the provider of tandem switching and transport on the theory that the traffic it routes is being routed to access stimulating LECs that should be paying such charges.³³ As Bandwidth explained, this will prompt expensive, time-consuming, and burdensome litigation for a tandem switching and transport providers to collect their bills.³⁴

III. Arguments that Attempt to Legitimize Denials of Direct Connect Requests to Terminate All or Certain Types of Traffic to a Terminating Carrier and Use of Intermediate Carrier Partners Should Be Rejected

As a final point, the Commission should reject arguments that attempt to legitimize a terminating carrier’s use of its intermediate carrier partner to justify denying direct connect

³⁰ See, e.g., 47 C.F.R. §§ 69.2(o) (defining “direct-trunked transport”), 69.4(b)(4) (specifying that a carrier’s charges for access services must include, among other things, “direct-trunked transport”) & 69.112. Relatedly, FCC Rule 69.112(i) states that CEA providers “are not required to provide direct-trunked transport service.”

³¹ *NPRM*, ¶ 13.

³² *Access Charge Reform, PrairieWave Telecommunications, Inc. Petition for Waiver of Sections 61.26(b) and (c) or in the Alternative, Section 61.26(a)(6) of the Commission’s Rules*, CC Docket No. 96-262, CC Docket No. 96-262, Order, 23 FCC Rcd 2556, ¶ 27 (2008).

³³ See, e.g. Letter from Tamar E. Finn, Counsel to Bandwidth Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 & 07-135; CC Docket No. 01-92 (dated May 31, 2018).

³⁴ See *id.*

requests made by other carriers for all or certain types of traffic. For instance, as record evidence demonstrates,³⁵ claims that direct connects are being appropriately denied in favor of using an intermediate carrier partner so as to stem robocalling and fraudulent calls, facilitate the IP transition, and improve overall quality of service³⁶ are a disingenuous smokescreen. Moreover, any claims that the intermediate carrier partner's rates are not unjust and unreasonable because the rates are tariffed and "benchmarked to the rate of the competing ILEC"³⁷ are spurious because, as noted above and by the Commission, "the monthly charges for direct connections can often be substantially lower than per-MOU rates for an equivalent amount of traffic."

³⁵ See, e.g. Peerless's Mar. 15, 2018 Letter, at 6-9.

³⁶ See, e.g. Letter from Matthew S. DelNero, Counsel to Inteliquent Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No 18-155, at 2 (filed June 1, 2018).

³⁷ *Id.*

Conclusion

For the foregoing reasons, the Commission should adopt CenturyLink's Proposed Direct Connect Rule and address any concerns it has in adopting CenturyLink's proposal as explained herein.

Respectfully submitted,

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